

IN THE MATTER OF	:	BEFORE THE
YALE PRESBYTERIAN CHURCH, INC.	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 12-012C

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DECISION AND ORDER

On August 13, 2012, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Yale Presbyterian Church, Inc., (Petitioner) for Conditional Use approval of a Structure Used Primarily for Religious Facilities in an R-20 (Residential: Single Family) Zoning District, pursuant to Section 131.N.40 of the Howard County Zoning Regulations (the Zoning Regulations).

The Petitioner certified to compliance with the notice, advertising, and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Petitioner. Robert Vogel, Mickey Cornelius and Wo Jung testified in support of the petition. Kelly Snovell, Deborah Snovell, Paul G. Jones, Carol Thumel and George Adams testified in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Light Pole Base Detail
2. Record Plat #18619 (F-07-11), Montgomery Station, Parcel A, September 27, 2006

3. Turning Radius letter to Cindy Hamilton from Robert Vogel, July 10, 2012
4. Google Earth Map depicting ingress/egress and easement access area

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the 2nd Election District on the southwesterly side of MD 103 (Montgomery Road) about 600 feet northwest of the intersection with MD 104 (Waterloo Road). The Property is referenced as Tax Map 31, Grid 7, Parcels 294 and 310 and is also known as 4852 and 4862 Montgomery Road. (the Property.)

2. Property Description. The 8.56-acre Property comprises two parcels. The westernmost, 5.3-acre, wooded Parcel 310 has 180 frontage feet on MD 103 and widens to about 225 feet in the rear section. It is about 950 feet in length. A house sits about 400 feet from MD 104 and 50 feet from the east lot line.

The 3.26-acre, L-shaped Parcel 294 has 100 frontage feet on MD 103 and widens to about 210 feet at about 360 feet into the lot. An office building sits about 40 feet from MD 103 and a large garage lies some 30 feet to the rear of this building. A third building lies about 400 feet from MD 103 and this structure will become part of the proposed religious facility. Access to this structure is from an unpaved driveway running along the east lot line. (This driveway will be eliminated according to the July 12, 2012 Revised Conditional Use Plan (Revised Plan). A wooden privacy fence runs along this driveway and common property line. The remainder of

this parcel consists of a lawn, scattered trees and the wooded rear area. The rear portion of the Property is encumbered with a stream, wetlands and associated buffers.

3. Vicinal Properties. East: The B-1 (Business: Limited) Parcel 17A adjoins the front portion of the Property's east lot line and is developed with two retail/office buildings in the Montgomery Station commercial development. A shopping center, including a Dunkin Donuts and associated parking are oriented toward MD 103. A second building in use as a veterinarian's office, with associated parking, is oriented perpendicular to the shopping center.

West: To the west are the R-20 zoned lots of the Knollview subdivision.

North: Across MD 103 are the R-20 zoned parcels 352 and 292 on the west side of Hale Haven Road and these are each improved with a single-family detached dwelling.

South: Parcel 357, Lot 2 adjoins the rear of Parcel 310 and is improved with a single-family detached dwelling. To the rear of Parcel 294, the R-20 zoned Parcel 36 is the site of the Hearthstone of Ellicott Mills II subdivision, an age-restricted adult housing development.

4. Roads. MD 103 in front of the Property has one eastbound, one westbound travel lane and a deceleration lane along Parcel 17 to provide access to the shopping center/veterinarian office. Deceleration and acceleration lanes on the north side of MD 103 support Hale Haven Road. According to data from the State Highway Administration (SHA), traffic volume on MD 103 west of MD 104 was 17,371 average daily trips as of May 1999.

5. Water and Sewer Service. The Property will be served by public water and sewer.

6. The General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential" land use. Transportation Map 2000-2020 of the 2000 General

Plan depicts MD 1013 as a Minor Arterial.

7. The Conditional Use Proposal. Petitioner is proposing to operate a religious facility on the Property. According to the July 2012 Revised Plan, a 4,200-square-foot addition would be constructed on the westerly side of the existing, 1,900-square foot block structure located on the Parcel 294 portion of the Property. The religious facility would use the residential structure on the Parcel 310 portion of the Property as the residential parish. The garage and office buildings in the front portion of Parcel 294 would be removed.

The existing driveways would be removed, eliminating direct access to MD 103. Petitioner is proposing a new access drive off the 124-space parking lot (including eight accessible spaces) on the east side of the Property. This access drive would utilize an existing use in-common access easement shared with Montgomery Station, allowing motorists to enter and exit the Property from MD 103.

According to the Conditional Use Plan, 680 linear feet of bench seating will be installed, for a total of 340 seats. The structures will comply with the 34-foot maximum height restriction and all setback regulations will be met. A dumpster would be located to the front of the proposed addition at the end of the parking lot.

The Landscape Schedule indicates the use of credits for existing woods and/or the existing privacy fence to fulfill landscaping requirements. A Type E landscape buffer is proposed along MD 103.

Three Sunday services will be held: 8:00-9:00 A.M., 11:00 a.m.-12:00 p.m. and 1:30-2:30 p.m. About 340 persons would attend services on Sunday. The petition also states that there would be parishioners and church personnel on site during the week.

8. Robert Vogel testified that the proposed lighting would comply with county regulations. Referring to Petitioner Exhibit 1, a light pole base detail, he explained the lighting would be a typical downward directed, fifteen-foot high shoebox design with cutoffs. Nine pole lights would be located in the parking lot.

9. Petitioner Exhibit 2 is a July 10, 2012 letter to Ms. Cindy Hamilton, DPZ Chief, Division of Land Development, from Mr. Vogel. Attached to the letter is an email from Fire Department Battalion Chief Edgar Schilling endorsing the revised turning radius and islands to accommodate fire trucks. This revision was made in response to the department's Technical Staff Report (TSR) comments.

10. As Mr. Vogel explained, the Original Plan depicted a right-in right-out access to accommodate the proposed use and because he thought the developer/owner of Montgomery Station would appreciate it. He eliminated this access upon reading the State Highway Administration (SHA) TSR comment that the SHA would not approve it.

11. It was Mr. Vogel's further testimony that he was the civil engineer who recorded Record Plat #18649, a use-in-common access easement. In his opinion, the SHA's comment about not approving the right-in right-out access was based on its expectation that Parcel 294 would be accessed only from the use-in-common easement. At the Hearing Examiner's request, he clarified the SHA's TSR comment that access to site "must be from the drive to the east and

must be located as far from the intersection with MD 103 as possible," which he understood to mean that the actual access to the Property lane be set back as far from MD 103 as possible. In his opinion, the proposed access met this criterion because the grade differential between Parcel A and Parcel 294 increases further south into the property, which would require a new easement and substantial grading.

12. Mr. Vogel believed the Montgomery Station property owner and developer knew the access easement was for a religious facility on Parcel 294. He further opined that the entirety of the proposed religious facility could be redesigned and relocated on Parcel 294, despite the presence of wetland buffers on the parcel.

13. On cross-examination by Kelly Snovell, the Montgomery Station property owner and developer, about the SHA's right-in right-out access comments and the TSR's recommendation that the Petitioner provide an access along MD 103, Mr. Vogel testified to having discussed the issue with SHA staff, who expressed their view that it was not a viable option.

14. Mr. Cornelius, a traffic engineer, testified that the proposed access would provide safe access. There is a right-turn lane, which becomes a deceleration lane for access to the signalized intersection at MD 104. Sight distance is good in both directions. There are no reported accidents at the driveway for the last three years. He opined that motorists existing from the left-out access lane might have to wait during rush hour until the light changed at MD 104. The only possible conflict for parishioners would occur as they exited the Property. This could be controlled by a stop sign at the Property exit drive, which would halt traffic until the

exit lanes at MD 103 are clear. On Sunday mornings, the only traffic volume generated would come from Dunkin Donuts and parishioners. Later in the afternoon, the nail salon creates additional minor additional traffic. The veterinary office and other uses do not operate on Sundays.

15. Mr. Cornelius also testified that motorists exiting the church site and making a left hand turn would either wait or precede incoming traffic. He recommended that a stop sign, stop bar, and a "do not block intersection" be installed at the church egress. Referring to Petitioner's Exhibit 4, an aerial view of the intersection with MD 103, he noted that such internal access drives are typical for commercial sites and prove to be safe.

16. On rebuttal, Mr. Cornelius explained the MD 103 ingress/egress meets the SHA's criteria for safe commercial access, even with the elimination of the right-in right-out access. In his view, the now-eliminated access would have exacerbated traffic safety, because the SHA would want to minimize access points between the existing ingress/egress and Hale Haven Drive, where the SHA prohibited left turns, and to consolidate access points. On Sundays, the traffic would be no greater than current Saturday uses, because traffic would be dispersed over three services.

17. Reverend Woo Jung testified to being the head pastor at Yale Presbyterian Church. He testified to the proposed uses of the site in addition to Sunday worship services.

Thursday morning -- 10:30 a.m., bible study (five-seven church members)

Friday night -- 6:00 and 8:00 p.m., bible study (five-ten church members)

Friday night -- 6:00 -- 8:00 p.m., youth group

Wednesday night -- 8:00 pm, bible study (twenty members)

Thursday and Saturday morning -- church office and administrative functions (three

part-time assistants, but usually only pastor)
New Year's Eve -- 10:00 p.m. 2:00 a.m., celebration

18. Kelly Snovell, the adjoining property owner and Montgomery Station developer, testified to having discussed access to the Property with an SHA employee, who informed him that SHA would like to see other access options, preferably one straight across from Hale Haven Rd. On cross-examination, Mr. Snovell opined that the ingress at MD 103 might be redesigned to provide direct access to the Property.

19. On cross-examination, Mr. Snovell stated the easement is not designed or intended to accommodate the proposed intensity or scale of use. He was aware the religious facility owned the adjoining parcel and intended to build/expand a religious facility structure on Parcel 294, but disagrees with Mr. Vogel that the facility as proposed could be constructed just on Parcel 294. When the SHA and the county came to him to explain the need for the easement, Yale Presbyterian Church had 75 frontage feet on MD 103, not 280 feet. In his view, the project has taken on a different scale, something larger than a church with 50 parishioners as had been explained to him when he agreed to the easement. In his view, with 280 frontage feet, the facility should have its own ingress and egress. He did not care that the church had been operating there for some time. He also described the parking impact of a Saturday flea market on his property, when attendees took up Montgomery Station spaces. Mr. Snovell further contested Mr. Cornelius' testimony that a right-turn in right-turn out access would not contribute to safety.

20. Deborah Snovell testified to being an owner of 4872 Montgomery Road

(Montgomery Station). She is concerned that at any time 125 cars could exit through the easement, which would block a portion of the ingress drive and cause significant backups. When the pastor spoke to her, the idea was that the church would use the existing building and have 50 parishioners. As she roughly gauged the proposed facility, it could not fit on Parcel 294. As proposed, the religious facility is much larger than the easement is intended to support based on its location relative to the ingress/egress driveway at MD 103. She would consider a reconfiguration of the entire ingress-egress to accommodate the proposed use.

21. Paul Jones testified to residing directly across from the Property. He testified that cars must cross two lanes when making a left hand turn from the MD 103 access. The volume of motorists already attending services causes cars to back up along MD 103 until MD 104.

22. Carol Thumel testified to operating the veterinarian office behind the shopping center. He does not believe the easement can accommodate the traffic associated with the proposed use or that it was intended to do so. The church has already affected his use, because parishioners already park in front of his building, especially on Saturdays, when three vets, the Dunkin Donuts, and the music lesson business create a high demand for parking. He is not convinced there will no other church uses than what was testified to. He is also concerned about traffic safety on Sunday, which will have a negative impact on Dunkin Donuts, as the traffic would deter people from coming there.

23. George Adams testified to residing on Hale Haven Drive. In his view, the proposed access is unsafe because people sit for long periods waiting to make left turns. People

also use the deceleration lane in front of the Property to access MD 104.

CONCLUSIONS OF LAW

I. Background Issue – The Use-in-Common Easement

Petitioner submitted the Original Conditional Use Plan on May 17, 2012. The Technical Staff Report (TSR) is based on this plan. According to this plan, Petitioner proposed a right-in/right-out driveway from MD 103, which would be located, approximately, in the central part of the Property. As Mr. Vogel testified, he eliminated the right-in right-out access in response to SHA comments.

There being no direct access from MD 103, the sole access to the proposed religious facility use, as depicted on the Revised Plan, is through a new access drive on the west side of the use-in-common easement. According to Petitioner Exhibit 2, this easement area is an approximately 60-foot by 40 foot area on Parcel 17 allowing Petitioner access to MD 103. Evaluating the proposed use under the general criteria for conditional uses, the TSR emphasizes the fact that the easement record plat (Plat #18619) was for the shared use of Parcels 294, 17 and 36A, and that "it was not anticipated that Parcel 310 would utilize the Easement." The TSR therefore concludes the addition of Parcel 310 to the Property after the recordation of Plat #18619 would result in an increased quantity of traffic beyond the level anticipated under the plat and recommends that direct access to MD 103 be provided in a location acceptable to the SHA.

As the Hearing Examiner explained during the proceeding, the legal matter as to whether the use-in-common easement recorded as Record Plat #18619 in 2006 and introduced

into evidence as Petitioner Exhibit 2 contemplates the level of traffic use proposed by Petitioner is the province of the courts, as zoning authorities have no jurisdiction to adjudicate private land covenants. The Hearing Examiner does have independent jurisdiction, however, to grant the conditional use subject to the condition that any claim of access to the Property for the proposed level of traffic use be resolved prior to implementation of the conditional use. See e.g., *Halle Companies et al. v. Crofton Civic Association et al.*, 339 Md. 131, 661 A.2d 682 (1995)(upholding the Anne Arundel County Board of Appeals granting of a special exception subject in part to the applicant's gaining legal access to the site and that the operation not commence until certain road improvements were made).

For this reason, the Hearing Examiner is granting the requested conditional use subject in part to the condition that the Petitioner validate its legal right of access to the Property (which consists of Parcels 294 and 310) through the use-in-common easement for the proposed traffic affiliated with the use before the use shall commence. This condition shall not apply if the SHA approves direct access to the Property or a reconfiguration of the existing ingress/egress access on Parcel 17 to accommodate the religious facility.

II. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed enlargement of an approved conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in

which it is located. In Howard County, the Zoning Regulations provide two policy standards by which to evaluate harmony with the General Plan.

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

In applying this test, the Hearing Examiner is guided by the decisions of the Maryland Courts, which has said that an evaluation of whether a proposed conditional use is in harmony with the General Plan is not synonymous with "in conformity with," "consistent with" or in "compliance with" the General Plan. Rather "in harmony with" is a more flexible standard requires the Hearing Examiner determine whether particular proposed use would be "so inimical or injurious to the announced objectives and goals of the comprehensive development plan so as not to be able to co-exist with the plan's recommendations." *Richmarr Holly Hills, Inc. v. American PCS L.P.*, 117 Md. App. 607, 656, 701 A.2d 879, 903 (1997).

In the review of any proposed conditional use, the use would have to frustrate or preempt achievement of the plan's recommendations before a finding of non-harmony would be justifiable. This approach is consistent with the legal nature of a conditional use, which is presumed to be valid and correct absent any fact or circumstances negating the presumption. Where the Plan stands silent, the use will be found to meet the test. *Id.* Thus, in order to defeat the presumption of harmony, an opponent must identify from within the General Plan a use or policy that would be frustrated by the proposed use.

In this case, the Howard County General Plan designates the area in which the Property is located as a Residential Area. The General Plan indicates that "places of worship" are a common component of residential communities (Chapter 5, pg. 168). Indeed, there is no argument that a structure used primarily for religious activities is a use that is in harmony with a residential land use designation.

The proposed use is also harmonious with General Plan Policy No. 5.7, which recommends that infill development be compatible with existing neighborhoods. In this case, the religious facility and parish structures will be located more than 750 feet from MD 103 and the proposed parking is well separated from residential uses. As the TSR comments, the institutional use is an appropriate transitional use between residential properties to the west and commercial properties to the east.

B. Adverse Effect

Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact from virtually every human activity. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would

have adverse effects in an RR zoning district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception (conditional) use irrespective of its location within the zone. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and subject to appropriate conditions of approval, the Hearing Examiner concludes the Petitioner has met its burden under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a religious facility.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The use will be conducted indoors. No outdoor play areas are proposed. Mr. Vogel testified to the type of lighting proposed and their location, such that outdoor lighting will not shine or reflect on adjacent properties. There is no evidence that the proposed intensity of use would generate inordinate noise, dust, fumes, odors or vibrations.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The Conditional Use Plan indicates that all structures will comply with the R-20 setbacks as well as the 34-foot maximum height limitation. The Landscape Schedule indicates existing woods or privacy credits for all perimeters, except MD 103, where a Type E landscape buffer is proposed.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The 680 linear feet of bench seating equates to 340 seats, per Zoning Regulations Section 133.D, based on one seat per two feet of seating. For 340 seats, 114 spaces are required (one space per three seats). Three spaces are required for the parish residence. A total of 124 spaces are proposed. This parking will be located in the front section of the Property and will be screened by existing and proposed landscaping and an existing privacy fence.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

Petitioner's witnesses testified to safe access, even without direct access, which in Mr. Cornelius' view would in fact decrease safety, owing to the use of the deceleration lane in front of the Property to access MD 104. There is no direct evidence that safe access will not be provided, considering that the SHA approved the existing Parcel 17 access at MD 103 for commercial use. Sight distance appears to be adequate. An existing deceleration lane runs along the front of the Property and provides access to Parcel 17. Petitioner will utilize the use in-common easement to access the new access drive on the east side of the Property.

As discussed in Part I of these Conclusions of Law, the Petitioner intends to access the Property through a new drive proposed to be located about 50 feet from MD 103. Should the Petitioner validate its legal right to access to the Property for the proposed use through the use-in-common easement, meaning that the size of the proposed religious facility and affiliated traffic was contemplated when the parties executed the easement, it will have demonstrated safe access.

II. Specific Criteria for Structures Used Primarily for Religious Activities (Section 131.N.39)

a. Lot coverage shall not exceed 25 percent of lot area.

The lot coverage is about 1.63 percent of the 8.56-acre Property and less than 25 percent of the lot area, in compliance with Section 131.N.39.a.

b. Structures used primarily for religious activities may be erected to a greater height than permitted in the district in which it is located, provided that the front, side and rear setbacks shall be increased one foot for each foot by which such structure exceeds the height limitation.

Section 131.N.39.c does not apply because the petition does not propose any structure higher than permitted (34 feet).

c. The Hearing Authority may approve parking facilities which are accessory to a religious facility, and are located on a separate lot, but do not meet the location requirements of subsection 133.B.4.D of the parking regulations by being separated from the religious facility by a public street, if the Hearing Authority finds that the accessory parking facility complies with the following criteria:

- (1) The accessory parking facility is not separated from the lot containing the principal use by an arterial highway of any category.**
- (2) A pedestrian street crossing connecting the accessory parking facility lot to the principal use lot is provided and is made clearly noticeable to drivers by means of both pavement marking and signs**

(3) The pedestrian street crossing is safe, based upon such factors as, but not limited to: traffic volume at the times(s) of the use of the accessory parking facility; practical traffic speeds; sight distance; length of the crossing; and adequate markings and signage.

(4) The entire pedestrian pathway from the accessory parking facility to the principal religious facility is a durable, paved, no-step path.

Section 131.N.39.c does not apply because the petition does not propose parking facilities on a lot separated by a public street.

ORDER

Based upon the foregoing, it is this **6th day of September 2012**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the request of Yale Presbyterian Church for Conditional Use approval of a Structure Used Primarily for Religious Facilities, in an R-20 (Residential: Single Family) Zoning District, is hereby **GRANTED**;

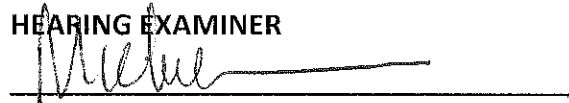
Provided, however, that:

1. The Petitioner shall validate its legal right of access to the Property (which consists of Parcels 294 and 310) through the use-in-common easement for the level of traffic affiliated with the religious facility before the use shall commence. This condition shall not apply if the State Highway Administration approves direct access to the Property or a reconfiguration of the existing ingress/egress access on Parcel 17 to accommodate the religious facility.
2. The Petitioner shall denote the location of all lighting fixtures on the Sight Development Plan.
3. The Conditional Use is limited to those activities set forth in the Findings of Fact.
4. The Petitioner shall not hold any activities on Saturday other than those set forth in the Findings of Fact.
5. The Petitioner shall install a stop sign, stop bar, and a "do not block intersection" at the church egress.
6. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed religious facility as described in the petition and as depicted on the Conditional Use

Plan dated June 7, 2011, as may be amended subject to State Highway Administration approval of any access reconfiguration, and not to any other activities, uses, or structures on the Property.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER

A handwritten signature in black ink, appearing to read "Michele", is written over a horizontal line.

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.